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Why Does the American Constitution Lack Social and Economic Guarantees

Cass R. Sunstein

WHY DOES THE AMERICAN CONSTITUTION LACK SOCIAL AND ECONOMIC GUARANTEES?

Cass R. Sunstein[†]

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> The alms given to a naked man in the street do not fulfill the obligations of the state, which owes to every citizen a certain subsistence, a proper nourishment, convenient clothing, and a kind of life not incompatible with health.[1]

This Republic had its beginning, and grew to its present strength, under the protection of certain inalienable political rights—among them the right of free speech, free press, free worship, trial by jury, freedom from unreasonable searches and seizures. They were our rights to life and liberty.

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1. BARON DE MONTESQUIEU, THE SPIRIT OF THE LAWS, bk. XXIII, ch. 29, at 25 (Thomas Nugent trans., Hafner Publ'g Co. 1949) (1748).

As our Nation has grown in size and stature, however—as our industrial economy expanded—these political rights proved inadequate to assure us equality in the pursuit of happiness. . . .

We have accepted, so to speak, a second Bill of Rights under which a new basis of security and prosperity can be established for all—regardless of station, race, or creed.

Among these are:

The right to a useful and remunerative job in the industries or shops or farms or mines of the Nation;

The right to earn enough to provide adequate food and clothing and recreation;

The right of every farmer to raise and sell his products at a return which will give him and his family a decent living;

The right of every businessman, large and small, to trade in an atmosphere of freedom from unfair competition and domination by monopolies at home or abroad;

The right of every family to a decent home;

The right to adequate medical care and the opportunity to achieve and enjoy good health;

The right to adequate protection from the economic fears of old age, sickness, accident, and unemployment;

The right to a good education. . . .

I ask the Congress to explore the means for implementing this economic bill of rights—for it is definitely the responsibility of the Congress so to do.[2]

INTRODUCTION

The Universal Declaration of Human Rights protects a wide range of social and economic rights.[3] It proclaims, for example, that "[e]veryone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment."[4] It also provides a "right to equal pay for equal work," a "right to form and to join trade unions for the protection of his interests," and a "right to just and favourable remuneration ensuring for himself and his family an existence

2. Franklin D. Roosevelt, Message to Congress on the State of the Union (Jan. 11, 1944), *in* 13 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 40-42 (Samuel I. Rosenman ed., 1950).

3. *See generally Universal Declaration of Human Rights,* G.A. Res. 217 A(III), U.N. GAOR, 3d Sess., pt. 1, at 71, U.N. Doc. A/810 (1948).

4. *Id.* art. 23(1).

worthy of human dignity, and supplemented, if necessary, by other means of social protection."[5] More broadly still, the Declaration proclaims that

> everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.[6]

The Declaration also provides a "right to education" and a "right to social security."[7]

The International Covenant on Social, Economic, and Cultural Rights follows the Declaration in creating social and economic rights, as do many constitutions, which guarantee citizens a wide range of social entitlements.[8] Of course, this was true for the Soviet Constitution.[9] But many non-communist and post-communist constitutions contain these rights as well. The Constitution of Norway imposes on the state the responsibility "to create conditions enabling every person capable of work to earn a living by his work."[10] The Romanian Constitution includes the right to work, the right to equal pay for equal work, and measures for the protection and safety of workers.[11] The Constitution of Peru announces, "The worker has the right to an equitable and sufficient remuneration, that procures, for him and his family material and spiritual welfare."[12] The Syrian Constitution proclaims that "[t]he state undertakes to provide work for all citizens."[13] The Bulgarian Constitution offers the right to work, the right to labor safety, the right to social security, and the right to free medical care.[14] The Hungarian Constitution proclaims, "People living within the territory of the Republic of Hungary have the right to the highest possible level of physical

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5. *Id.* art. 23(2)-(4).

6. *Id.* art. 25(1).

7. *Id.* arts. 22, 26(1).

8. MATTHEW C. R. CRAVEN, THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL, AND CULTURAL RIGHTS: A PERSPECTIVE ON ITS DEVELOPMENT 359 (1995).

9. *See* U.S.S.R. CONST of 1977. ch. 7 (The Basic Rights, Freedoms, and Duties of Citizens of the U.S.S.R.).

10. NOR. CONST. pt. E (General Provisions), art. 110.

11. ROM. CONST. tit. II (Fundamental Rights, Freedoms, & Duties), ch. II (Fundamental Rights and Freedoms), arts. 38(1), (2), (4).

12. PERU CONST. tit. I (The Person and Society), ch. II. (Social and Economic Rights), art. 24.

13. SYRIA CONST. ch. I (Basic Principles), pt. IV (Freedoms, Rights, Duties), art. 36(1).

14. BULG. CONST. ch. II (Fundamental Rights and Obligations of Citizens), arts. 48(1), 48(5), 51(1), 52(1).

and mental health."[15] It also provides that "[e]veryone who works has the right to emolument that corresponds to the amount and quality of the work performed."[16]

Not every modern constitution creates rights of this sort; such rights are entirely absent from a number of contemporary constitutions. Indeed, some nations recognize such rights, but in a way that seems to make them goals and not rights at all. The Constitution of Switzerland, for example, says that "[t]he Confederation and the Cantons shall strive to ensure" certain rights, including social security, necessary health care, and more.[17] The Constitution of India offers a range of civil and political rights, and also offers "Directive Principles of State Policy," saying that "[t]he State shall . . . direct its policy towards securing" certain rights, including "an adequate means of livelihood," "equal pay for equal work for both men and women," and more.[18] This strategy is taken as well in the constitutions of Ireland, Nigeria, and Papua New Guinea.[19] The South African Constitution recognizes a wide range of social and economic rights, but also acknowledges resource constraints, typically obliging the state to "take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of" the relevant right.[20] Provisions of this kind are ambiguous, but they have been held to be justiciable, obliging the government not to default in its basic obligations.[21]

I am concerned here with a particular puzzle. The constitutions of most nations create social and economic rights, whether or not they are enforceable, but the American Constitution does nothing of the kind. Why is this? What makes the American Constitution so distinctive in this regard?

I will explore four possible answers here.[22] In the process I hope to cast some light on the effects of constitutions, cultural differences, and social and economic guarantees in general. The first explanation is chronological; it points simply to the age of the American Constitution,

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15. HUNG. CONST. ch. XII (Fundamental Rights and Duties of Citizens), art. 70/D(1).

16. *Id.* art. 70/B(3).

17. SWITZ. CONST. tit. II (Fundamental Rights, Civil Rights and Social Goals), ch. III (Social Goals), art. 41(1), 41(1)(a)-(b).

18. INDIA CONST. pt. IV (Directive Principles of State Policy), art. 39, 39(a), (d).

19. *See* IR. CONST. ch. XIII (Directive Principles of Social Policy), art. 45; NIG. CONST. ch. II (Fundamental Objectives and Directive Principles of State Policy), art. 17(3)(a), (e); PAPUA N.G. CONST. pmbl. para. 2.

20. S. AFR. CONST. ch. 2 (Bill of Rights), §§ 26(2), 27(2).

21. *See* Gov't of the Republic of South Africa v. Grootboom, 2000 (11) BCLR 1169 (CC) at ¶¶ 19-20.

22. The issues explored in this article are discussed in more detail in CASS R. SUNSTEIN, THE SECOND BILL OF RIGHTS (2004).

which is the oldest in force in the world. The second, institutional in nature, emphasizes that social and economic rights cannot easily coexist with judicial review, a preoccupation of the American legal culture. The third explanation points to "American exceptionalism," as it is standardly understood: the absence of a significant socialist movement in the United States. The fourth, rooted in legal realism, stresses developments within the United States Supreme Court in the 1960s and 1970s. In the end, my major suggestion will be that the fourth explanation is the most interesting, and in an important sense, correct. The Constitution means what the Supreme Court says that it means, and with a modest shift in personnel, the Constitution would have been understood to create social and economic rights of the sort recognized in many modern constitutions, and indeed in the constitutions of some of the American states.

An additional word before we proceed: to evaluate the four explanations, it is important to distinguish between necessary and sufficient conditions for the recognition of social and economic rights. Judicial interpretation of an ambiguous constitutional provision is a sufficient condition, though not a necessary one. Ratification of an explicit provision is a sufficient condition, though not a necessary one. I am concerned here to explore both the failure of a serious ratification effort and the absence of a judicial interpretation that would recognize social and economic rights.

This article is organized as follows. Part I offers some conceptual preliminaries. My goal here is to challenge the claim of a sharp dichotomy between traditional constitutional rights and social and economic rights by showing that both of these depend on an active government, and indeed on the expenditure of taxpayer funds. Part II explores the chronological explanation. Part III briefly discusses the amendment process and also the New Deal period, in which social and economic guarantees received prominent public attention. Part IV examines institutional considerations. Part V investigates the cultural explanation. Part VI explores developments in the 1960s and 1970s, suggesting that the Court came close to understanding the Constitution to create social and economic rights, and that with slight differences in personnel, the Court would have done exactly that. The final part is a brief conclusion.

I. CONCEPTUAL PRELIMINARIES

What is distinctive about social and economic rights? What makes them unusual? The conventional answer is that while ordinary rights create "negative" checks on government, preserving a sphere of private immunity, social and economic rights impose "positive" obligations on government, creating a set of private entitlements to governmental assistance. On this

view, negative guarantees are both time-honored and consistent with the (classical) liberal tradition. Positive rights are novel, a creation of the New Deal, or social democracy, or perhaps socialism, assimilating to the category of "rights" what would otherwise be seen as pleas for public assistance. In a standard formulation, Roosevelt's proposed Second Bill of Rights, set out as above, is distinctive "in linking together the negative liberty from government achieved in the old Bill of Rights to the positive liberty through government to be achieved in the new Bill of Rights."[23]

This is indeed a conventional way to see matters, and it has some historical support. Social and economic guarantees, often described as "second generation" rights, did receive recognition long after the traditional "negative" rights. But the conventional understanding is a bad way of understanding the relevant categories. Most of the so-called negative rights require governmental assistance, not governmental abstinence. Those rights cannot exist without public assistance. Consider, for example, the right to private property. As Bentham wrote, "Property and law are born and must die together. Before the laws, there was no property: take away the laws, all property ceases."[24] In the state of nature, private property cannot exist, at least not in the way that it exists in a free society. In the state of nature, any property "rights" must be protected either through self-help—useful to the strong, not to the weak—or through social norms. This form of protection is far too fragile to support a market economy or indeed the basic independence of citizens. As we know and live it, private property is both created and protected by law; it requires extensive governmental assistance.

The same point holds for the other foundation of a market economy, the close sibling of private property: freedom of contract. For that form of freedom to exist, it is extremely important to have reliable enforcement mechanisms in the form of civil courts. The creation of such mechanisms requires action, not abstinence. Nor is the point—the dependence of rights on public assistance—limited to the foundations of a market economy. The Fifth, Sixth, Seventh, and Eighth Amendments—a significant part of the original Bill of Rights—regulate the systems of criminal and civil justice.[25]

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23. DORIS KEARNS GOODWIN, NO ORDINARY TIME: FRANKLIN AND ELEANOR ROOSEVELT: THE HOMEFRONT IN WORLD WAR II 485 (1994); *see* Roosevelt, *supra* note 2, at 40-42.

24. JEREMY BENTHAM, *Principles of the Civil Code*, *in* 1 THE WORKS OF JEREMY BENTHAM 297, 309 (John Bowring ed., 1843).

25. *See* John R. Ellingston, *The Right to Work*, 243 ANNALS AM. ACAD. POL. & SOC. SCI. 27, 33 (1946).

They require jury trials, fair hearings, rules of evidence, and bail.[26] By doing this, and more, they require taxpayers to devote a great deal of money to the administration of justice.[27] Consider the suggestion that

> it is only because we are born into this mechanism as we are born into our homes that we take it for granted and fail to realize . . . what an immensity of daily effort on the part of government is required to keep it running. In terms of mechanism and trained personnel, a system of social security is child's play in comparison with the system that gives effect to due process of law.[28]

Or take the right to be free from torture and police abuse, perhaps the defining "negative" freedom. Of course, it is possible to say that this right is a "negative" safeguard against public intrusion into the private domain, and in a way that statement is true. But as a practical matter, the right to be free from torture and abuse requires a state apparatus willing to ferret out and punish the relevant rights violations. If the right includes protection against private depredations, it cannot exist simply with governmental abstinence. If the right is limited to protection against public abuse of power, it can be satisfied by abstinence; but in practice, abstinence from torture and abuse must be guaranteed by a public apparatus that will deter and punish misconduct. Some rights require government to protect against its own rights violations. If we go down the list of conventional private rights, we will see this same point at every turn.

There is a larger implication, with direct relevance to the question of social and economic rights. All constitutional rights have budgetary implications; all constitutional rights cost money.[29] If the government plans to protect private property, it will have to expend resources to ensure against both private and public intrusions. If the government wants to protect people against unreasonable searches and seizures, it will have to expend resources to train, monitor, and discipline the police. If the government wants to protect freedom of speech, it must, at a minimum, take steps to constrain its own agents; and these steps will be costly. It follows that insofar as they are costly, social and economic rights are not unique.

Now it is possible that such rights are unusually costly. For example, to ensure that everyone has housing, it will be necessary to spend more than must be spent to ensure that everyone is free from unreasonable

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26. *Id.*
27. *Id.*
28. *Id.*
29. This is the theme of STEPHEN HOLMES & CASS R. SUNSTEIN, THE COST OF RIGHTS: WHY LIBERTY DEPENDS ON TAXES (1999).

searches and seizures. But any such comparisons are empirical and contingent; they cannot be made on an a priori basis. We could imagine a society in which it costs a great deal to protect private property, but not so much to ensure basic subsistence. Of course, most societies are not like that. In most societies, the management of a social welfare system is more expensive than the management of a system to protect property rights. This kind of distinction—quantitative rather than qualitative in nature—is probably the central one.

II. CHRONOLOGY

A. The First Generation of Framers and the First Generation of Rights

In explaining the absence of social and economic guarantees from the American Constitution, the most natural point is chronological. The simple claim is that the American Constitution, the oldest existing constitution in the world, was ratified during the last part of the eighteenth century—a time when constitutions were simply not thought to include social and economic guarantees.[30] The American framers were building on rights as understood in the British tradition. No one then suggested, or even thought to suggest, that the Bill of Rights should contain guarantees of this kind. When it was drawn up, the American approach was entirely standard; hence the absence of social and economic rights is simply a matter of timing. On this view, there was no American exceptionalism, and there is really no puzzle to solve. When modern constitutions were drawn up, the international understanding was altogether different; hence it is entirely expected that social and economic rights are found in the constitutions of, for example, Bulgaria, South Africa, Norway, and Russia.[31] Whether a constitution contains second-generation rights can be predicted pretty well just by looking at when it was ratified.[32] With respect to such rights at the constitutional level, American exceptionalism is a myth and an illusion.

B. The Second Generation in the First: Principle

To emphasize the chronological point is emphatically not to suggest that the American framers did not care about poor people. On the contrary,

30. Of course this point itself remains to be explained. But any such explanation would not involve American exceptionalism of any sort, which is my concern here.

31. *See* BULG. CONST. ch. II (Fundamental Rights and Obligations of Citizens); NOR. CONST. pt. E (General Provisions); RUSS. CONST. § 1, ch. 2 (Rights and Liberties of Man and Citizen); S. AFR. CONST. ch. 2 (Bill of Rights).

32. *See, e.g.*, BULG. CONST. (1991); NOR. CONST. pt. E (General Provisions), art. 110 (amended 1945, 1972); RUSS. CONST. (1993); S. AFR. CONST. (1996).

some of their writing suggested a strong commitment to protection for those at the bottom, though not at the constitutional level. James Madison, who was probably the most influential voice in the founding period, offered the following means of "combat[ing] the evil" of parties:

> 1. By establishing a political equality among all. 2. By withholding *unnecessary* opportunities from a few, to increase the inequality of property, by an immoderate, and especially an unmerited, accumulation of riches. 3. By the silent operation of laws, which, without violating the rights of property, reduce extreme wealth towards a state of mediocrity, and *raise extreme indigence towards a state of comfort.*[33]

Jefferson, who was not a framer, but a strong influence during the founding period, wrote:

> I am conscious that an equal division of property is impracticable. But the consequences of this enormous inequality producing so much misery to the bulk of mankind, legislators cannot invent too many devices for subdividing property, only taking care to let their subdivisions go hand in hand with the natural affections of the human mind. . . . Another means of silently lessening the inequality of property is to exempt all from taxation below a certain point, and to tax the higher portions of property in geometrical progression as they rise. Whenever there is in any country, uncultivated lands and unemployed poor, it is clear that the laws of property have been so far extended as to violate natural right. The earth is given as a common stock for man to labour and live on.[34]

It is relevant here that many of the classical liberal thinkers, far from rejecting social and economic rights, explicitly endorsed them. Recall Montesquieu's claim, quoted above: "The alms given to a naked man in the street do not fulfill the obligations of the state, which owes to every citizen a certain subsistence, a proper nourishment, convenient clothing, and a kind of life not incompatible with health."[35] John Locke, of course, was a large influence on American political thought. He wrote, in similar terms:

> As *Justice* gives every Man a Title to the product of his honest Industry, and the fair Acquisitions of his Ancestors descended to him; so *Charity* gives every Man a Title to so much out of another's

33. James Madison, *Parties*, NAT'L GAZETTE, Jan. 23, 1792, *reprinted in* 14 THE PAPERS OF JAMES MADISON 197 (R.A. Rutland et al. eds., Univ. Press of Va. 1983) (1962) (second emphasis added).

34. Letter from Thomas Jefferson to James Madison (Oct. 28, 1785), *in* 8 THE PAPERS OF THOMAS JEFFERSON 682 (Julian P. Boyd ed., Princeton Univ. Press 1953).

35. *See* MONTESQUIEU, *supra* note 1, bk. XXIII, ch. 29, at 25.

> Plenty, as will keep him from extream want, where he has no means to subsist otherwise. . . .[36]

The chronological account, in short, emphasizes that some of the Constitution's framers believed in protection against acute deprivation, but adds that they did not believe in placing those rights in a constitution for the simple reason that constitutionalization of such rights was a most foreign concept at the time. Of course, it would remain necessary to explain the reason for the rise of second-generation rights—why they were absent when they were absent, and why they arose when they did—but this would not be a question about American exceptionalism in particular. It would be a question about changing conceptions of constitutional rights over time.

C. A Problem

Undoubtedly, the chronological account has considerable truth. But as a complete explanation, it faces a serious problem: the meaning of the Constitution changes over time. In numerous ways, the American Constitution has gone far beyond the original understanding of its authors and ratifiers. Constitutional change is, in part, a function of explicit constitutional amendments, and this is the place to begin. After the Civil War, the Constitution was, of course, significantly altered. Here too, we find no serious interest in amending the Constitution to include social and economic rights.[37] Why not? Perhaps the same chronological account works here as well: in the late nineteenth century, social and economic rights were generally unfamiliar. But in the New Deal period, the Constitution was not amended at all; there was no interest in adding such rights to the Constitution.[38] Why not? In the midst of President Johnson's Great Society, and during widespread late-twentieth century interest in reducing poverty through housing rights, welfare rights, health care rights, and the like, America saw no serious debate about constitutional amendments. There was no significant discussion of adding social and economic rights to the American Constitution. The chronological account cannot explain this fact.

There is another problem. Constitutional change is often a product not of constitutional amendment, but of interpretation, leading to new

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36. JOHN LOCKE, TWO TREATISES OF GOVERNMENT 170 (Peter Laslett ed., Cambridge Univ. Press, student ed. 1988) (1690).

37. This statement overlooks some complexities. For a general discussion, *see generally* SUNSTEIN, *supra* note 22.

38. *See infra* Part III.

understandings of old provisions.[39] Even if the eighteenth century constitution did not contain social and economic rights, the American Constitution might well have been interpreted to do so. Consider the question whether there is a problem of "American exceptionalism" in the absence of a ban on sex discrimination in the American Constitution. Many contemporary constitutions explicitly ban sex discrimination; why is the American Constitution so different?[40] A chronological account offers part of an answer, but it is ludicrously incomplete. The Equal Rights Amendment (ERA) might have been ratified. It wasn't; why not? Part of the answer points not to American exceptionalism in the context of sex equality, but to the change in judicial interpretation of the Equal Protection Clause over time. The American Constitution is now understood to have something very much like a constitutional ban on sex discrimination, not because of the original understanding of its text, but because of new judicial interpretations.[41] If this has happened in the context of sex equality, why hasn't it happened for social and economic rights as well? The chronological account offers no answer. And the example could easily be multiplied. In many ways, the American Constitution has come to be interpreted in ways that depart from its original meaning. Why haven't social and economic rights been part of new constitutional understandings?

III. DETOUR: AMENDMENTS AND THE NEW DEAL

A. Procedural Difficulties

The chronological account can be strengthened by emphasizing a simple fact: it is not easy to amend the American Constitution, even if there is wide support for the amendment. The Constitution moves some way toward locking out changes—not by making them impossible, but by making them extremely difficult. The American public broadly supported the ERA, but it nonetheless failed to pass. Because the Constitution creates real obstacles to amendment, immense popular support was not enough to ensure ratification of the ERA. Even if social and economic rights commanded widespread popular support, they might not find their way into the Constitution.

By itself, this point appears to be a weak explanation of the failure to create social and economic rights because no serious amendment effort was

39. *See generally* David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877 (1996).

40. *See, e.g.*, INDIA CONST. pt. III (Fundamental Rights), art. 15.

41. *See, e.g.*, Pers. Adm'r of Massachusetts v. Feeney, 442 U.S. 256, 274 (1979).

made. In these circumstances, it might seem that the difficulty of amending the Constitution cannot explain the situation. But the absence of a serious amendment effort should not be misinterpreted. The very difficulty of amending the Constitution has a strong deterrent effect on efforts to do so, and perhaps such an effort would have been made within a different constitutional structure. Because it is difficult to speculate about counterfactual history, the possibility cannot be ruled out. But there is every reason to think that even with a much easier amendment process, the Constitution would not have been altered to provide social and economic guarantees. The very absence of a significant attempt to alter the Constitution supports this speculation.

B. Second Generation Rights in the New Deal

The point can be clarified by reference to the New Deal era. This was the period in which American elites thought most seriously about social and economic guarantees—not with an eye toward constitutional amendments, but nonetheless in a serious and self-conscious manner. Indeed, the New Deal saw a large-scale renovation of the American constitutional structure, amounting to a kind of second American Revolution.[42] The renovation involved the three cornerstones of that structure: federalism, checks and balances, and individual rights.[43] It is well-known that the powers of the national government significantly increased, and a great deal of authority was concentrated in the presidency. What is less well-known is the nature of the New Deal's renovation of pre-existing understandings of legal rights. Before the New Deal, the American legal culture defined "rights" largely in terms of the eighteenth century catalogue of the common law; hence freedom of contract and private property were prominent illustrations of rights protected from governmental incursion.

The New Dealers believed that the common law catalogue included too much and too little. A large part of their argument was an effort to denaturalize the common law. In their view, rights of freedom of contract and private property depended on a legal apparatus for their existence; they were hardly natural, but rather resulted from a form of governmental intervention into private affairs. Thus, Roosevelt urged, "We must lay hold of the fact that economic laws are not made by nature. They are made by human beings."[44] This claim did not mean that freedom of contract and

42. Or perhaps third if we include the Civil War Amendments.
43. For more detail, *see generally* SUNSTEIN, *supra* note 22.
44. Franklin D. Roosevelt, Speech Before the 1932 Democratic National Convention

private property were bad ideas, but it did mean that they should be evaluated pragmatically and in terms of what they did for, or to, the human beings subject to them. And on this count, the New Dealers supported many readjustments of common law interests. Rights to governmental protection within the employment market, for example, were insufficiently protected by the common law, as were the interests of the poor, consumers of dangerous food and drugs, the elderly, traders on securities markets, and victims of unfair trade practices.

This basic theme, the central ingredient of New Deal constitutionalism, was prominent throughout Roosevelt's presidency. In his speech accepting the Democratic nomination for the presidency in 1936, for example, Roosevelt argued that although the constitutional framers were concerned only with political rights, new circumstances required the recognition of economic rights as well because "freedom is no half-and-half affair."[45] The most dramatic statement of this revised notion of entitlement came in President Roosevelt's State of the Union address of 1944, which set forth the "Second Bill of Rights," quoted as the epigraph to this essay.[46]

In coming to terms with Roosevelt's proposal, three points are worth emphasizing. The first is the sheer amplitude of the relevant rights, including most of what can be found in the Universal Declaration and in contemporary constitutions.[47] The second is Roosevelt's insistence that the relevant rights had already been "accepted," post-New Deal—that they reflected the nation's official creed in 1944, and hence represented no new innovation.[48] The third is that Roosevelt proposed no constitutional amendment, and no judicial role, but instead an effort by Congress to "explore the means for implementing this economic bill of rights."[49] It should be noted in this regard that at the state level, constitutional amendments were ratified, endorsing aspects of the Second Bill of Rights as a matter of state constitutional law. Indeed, a number of states now offer

(July 2, 1932), *in* THE ESSENTIAL FRANKLIN DELANO ROOSEVELT 27 (John Gabriel Hunt ed., 1995).

45. Franklin D. Roosevelt, Acceptance of the Renomination for the Presidency (June 27, 1936), *in* 5 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 234 (Samuel I. Rosenman ed., 1938).

46. *See* Roosevelt, *supra* note 2, at 40-42.

47. *Compare id.* at 41, *with* BULG. CONST. ch. II (Fundamental Rights and Obligations of Citizens); NOR. CONST. pt. E (General Provisions); PERU CONST. tit. I (The Person and Society), ch. II (Social and Economic Rights); SYRIA CONST. ch. I (Basic Principles), pt. IV (Freedoms, Rights, Duties); *Universal Declaration of Human Rights, supra* note 3.

48. *See* Roosevelt, *supra* note 2, at 41.

49. *Id.* at 42.

some constitutional declaration of social and economic rights. The New York Constitution is exemplary: "The aid, care, and support of the needy are public concerns and shall be provided by the state and by such of its subdivisions, and in such manner and by such means, as the legislature may from time to time determine."[50] The claim of large-scale American exceptionalism as a *cultural* matter is complicated not only by Roosevelt's plea for a Second Bill of Rights, but also by the existence of considerable constitutional innovation at the state level—activity that has not, by the way, made much difference in terms of actual lives of poor people.

But for present purposes, the crucial point is that the New Dealers did not pursue constitutional reform. Their approach on this count is fully consistent with their general strategy, which was to avoid official amendments entirely, and to use political processes and constitutional interpretation to move in the directions that they sought. Part of the reason for this strategy was the sheer difficulty of producing constitutional amendments. Part of it was the great suspicion of the conservative judiciary. For those interested in creating a Second Bill of Rights, constitutional amendment did not seem to be an attractive option in light of the inevitable fact that any such amendment would increase the authority of judges. The point is directly related to the second explanation, to which I now turn.

IV. CONSTITUTIONS AS PRAGMATIC INSTRUMENTS

The institutional explanation claims that in the American culture, constitutions are seen as pragmatic instruments—suited for, and not inextricable from, judicial enforcement. And indeed it is useful, even crucial, to distinguish between the *pragmatic* and the *aspirational* conceptions of constitutions. When presented with a proposed constitutional provision, many Americans tend to ask, "What will this provision do, in fact? How will courts interpret this provision, in fact?"

These questions played a major role in debates over the ERA—helping to raise qualms about it even for those committed to sex equality. But other people, especially but not only those in Europe, tend to think of constitutions as literally declarative—as expressive of a nation's deepest hopes and highest aspirations. They like to ask, "What values does this provision affirm, in principle?" They see a constitution as a kind of declaration, probably not meant for judicial enforcement, and possibly not meant for compliance in the real world.

50. N.Y. CONST. art. XVII (Social Welfare), § 1.

As analogies, consider the Declaration of Independence or even the Universal Declaration of Human Rights, which was debated and signed with little attention to the question of judicial enforcement, which was, of course, not contemplated. And while the United States ratified the International Covenant on Civil and Political Rights, which grew out of the Universal Declaration, it took a relatively unusual stance among modern nations in refusing to ratify the International Covenant on Social, Economic, and Cultural Rights, perhaps because of a belief that the rights contained in the latter were not enforceable. It is important to emphasize here that many of the constitutions containing social and economic rights simply borrowed from the Universal Declaration. It is also important to note that there is real doubt about whether the many constitutions containing social and economic rights have made any difference at all "on the ground"—that is, there is real doubt about whether such rights have actually led to more money, food, or shelter for poor people.

If we take the pragmatic approach, we will be likely to ask whether social and economic rights would be a sensible part of an enforceable constitution containing the important institution of judicial review. Should a constitution create a "right to just and favourable remuneration?"[51] To "a standard of living adequate for the health and well-being of" one's family, "including food, clothing, housing and medical care and necessary social services?"[52] To "rest and leisure?"[53] What would these provisions mean, concretely? What would they mean in a poor nation with high levels of unemployment and inadequate medical care and housing? What would they mean, concretely, in a wealthy nation like the United States or France? If a nation failed to protect the relevant rights, would courts be authorized to intervene—as they usually are, when rights are violated?

If these questions appear difficult to answer, we might explain American exceptionalism, in institutional terms, as a response to the conception of constitutional rights as pragmatic instruments. And we might explain the contemporary practice of including such rights, all over the world, as a product of an understanding that they need not mean much, if anything, in practice. Such rights are meant as *signals*, domestically and internationally, but they are not legally enforceable instruments. On this view, Americans should not be thought skeptical of social and economic guarantees in principle; even Ronald Reagan was committed to a social safety net. The real source of skepticism is an account of what kind of

51. *Universal Declaration of Human Rights*, *supra* note 3, art. 23(3).
52. *Id.* art 25(1).
53. *Id.* art. 24.

document a constitution really is, and of what kinds of rights belong in a document of that sort.

There is considerable truth in this explanation. American courts have been reluctant to recognize social and economic rights, in part because of a belief that enforcement and protection of such rights would strain judicial capacities. Political actors, even those interested in helping poor people, have been skeptical about the likely effectiveness of constitutional provisions that might be ignored in practice. Outside of the United States, some nations, including India and South Africa, have been alert to the underlying difficulties, and have sharply limited the constitutional status of such rights by reducing judicial authority. And as I have noted, social and economic rights have served as aspirations, with apparently no real-world effects, in the many nations in which they are recognized. It is hard to show that nations that are relatively more likely to help poor people do so because they have constitutional provisions calling for such help.

But the institutional account cannot be the entire picture. For one thing, it is a bit fussy and bookish. It may be possible to *justify* the refusal to constitutionalize social and economic rights by pointing to problems in judicial enforcement; but can we really *explain* that refusal in the United States by pointing to those problems? In any case, those who want constitutions to be pragmatic instruments need not reject the idea of social and economic rights. In the United States itself, state constitutions protect those rights, and some courts are willing to enforce them, at least to some degree.[54] In South Africa, initial steps have been taken, not toward careful judicial oversight of the welfare system, and not toward ensuring that everyone has decent shelter and food, but toward ensuring that the government at least creates "programs" that ensure minimal attention to basic needs.[55]

It is surely right to say that social and economic rights could strain judicial capacities. Certainly no court, in poor and rich nations, can ensure that everyone has decent food, clothing, medical care, and housing.[56] But those who are committed to such rights, in principle, might well urge that courts could take steps to ensure that basic needs receive a degree of legislative priority, and to correct conspicuous neglect. As a result, the institutional explanation has a serious defect.

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54. *See, e.g.*, Tucker v. Toia, 371 N.E.2d 449, 452 (N.Y. 1977).

55. *See generally* Gov't of the Republic of South Africa v. Grootboom, 2000 (11) BCLR 1169 (CC).

56. Compare first-generation rights, which are not very different on this count. The Fourth Amendment, for example, is violated every day.

V. THE CULTURAL EXPLANATION

I now turn to what may well be the most tempting explanation, one that points to American exceptionalism in general. Socialism has never been a powerful force within the United States. America is said to be exceptional because "it didn't happen here": there was never a strong effort to move the United States in the direction of socialism or social democracy.[57] On this view, the absence of social and economic rights in our Constitution has an explanation in terms of American politics or even culture. No group that might have been interested in such rights was ever powerful enough to obtain them. In the debate over the Universal Declaration, socialist and communist nations were most enthusiastic about social and economic guarantees, whereas capitalist nations were comparatively skeptical. Perhaps this, in a nutshell, is the best explanation for the American Constitution's failure to include such guarantees. The Constitution's content is a political artifact, and American politics is simply distinctive. Recall the American skepticism about the International Covenant on Social, Economic, and Cultural Rights.

There is, of course, an extensive literature on American exceptionalism in general, with many competing views. Some people have thought or suggested that American workers have had a high degree of upward mobility, muting dissatisfaction with any particular status quo. Others have suggested that feudalism is a necessary precursor for socialism, and that because America lacks a feudal past, socialism was inevitably going to fail. Others suggest that the American electoral system, with two dominant parties and elaborate checks and balances, dampened socialist efforts in the period in which they succeeded elsewhere. Still others suggest that powerful private groups were quick to suppress socialist movements whenever they threatened to be effective. For present purposes, it is unnecessary to choose among these competing explanations. What matters is the underlying weakness of socialism in the United States.

There is this much truth in the cultural explanation: the existence of social and economic rights, within a nation's constitution, is correlated with the strength of socialist or left-wing elements within that nation. In America, a strong socialist movement might well have sought a constitutional amendment, or instead led to political changes that would have produced novel interpretations. As we shall see, a more left-wing political order would have produced a more left-wing Supreme Court, and such a court would likely have interpreted the Constitution to recognize

57. *See generally* SEYMOUR MARTIN LIPSET & GARY MARKS, IT DIDN'T HAPPEN HERE (2000).

social and economic rights. For this reason, it is right to claim that to understand the absence of such rights from American constitutional law, it is helpful to say something about the absence of a significant socialist movement in the United States.

But again, as a full account of the situation, the cultural explanation is plainly inadequate. The reason is that a strong socialist movement is neither a necessary nor a sufficient condition for social and economic rights. It is easy to imagine a nation that has such a movement, but does not think it useful to insist on constitutional provisions of this kind. Consider Canada, Israel, and England, three nations with strong socialist movements but without social and economic rights in their constitutions. It is also easy to imagine a nation without a strong socialist movement but with considerable enthusiasm for social and economic rights.

In 1991 a sample of the nation's citizens was asked whether certain goods were "a privilege that a person should have to earn," or instead "a right to which he is entitled as a citizen." By strong majorities, the respondents answered that a college education, a telephone, and an annual salary increase are privileges, not rights. But by equally strong majorities, they said that the following were rights: adequate housing, a reasonable amount of leisure time, adequate provision for retirement years, an adequate standard of living, and adequate medical care. Strong majorities endorsed many of the items on the second bill. In 1990 Americans were asked whether the government "should provide a job for anyone who wants one." Of those who expressed an opinion, an overwhelming 86 percent agreed. In 1998, 64 percent of Texans agreed that the "government should see to it that everybody who wants to work can find a job."[58]

Franklin Delano Roosevelt was no socialist—indeed, he strongly believed in capitalist institutions and free enterprise—but he was committed to "freedom from want," and, as we have seen, he sought congressional protection of that form of freedom.[59] It is easy to imagine a somewhat different FDR, one who had the same set of substantive beliefs, but one who also believed that the constitutional route was the correct one to take. Why was that FDR not America's FDR? The reason does not lie in the absence of a strong socialist movement in the United States. If an American president could be committed to Roosevelt's Second Bill of Rights for legislative enactment, he could also be committed to a Second

58. SUNSTEIN, *supra* note 22, at 63.

59. Franklin D. Roosevelt, The Four Freedoms, State of the Union Address (Jan. 6, 1941), *in* 9 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 663 (Facts-on-File, Inc. ed. 1995); *see* Roosevelt, *supra* note 2, at 40-42.

Bill of Rights at the constitutional level. The absence of significant American interest in constitutionalizing social and economic rights cannot be explained by reference to culture alone.

VI. THE REALIST EXPLANATION

I have emphasized that the meaning of the American Constitution changes because of new interpretations. If the Constitution meant, in all respects, what it originally meant, American constitutional rights would be thin indeed. Most of the key rights-protecting provisions now mean far more than they originally meant. For example, no provision of the Constitution forbids the national government from discriminating on the basis of race; but the Fifth Amendment, preventing denials of liberty without due process of law, is now taken to prohibit race discrimination at the national level.[60] The best reading of history is probably that the First Amendment allowed Congress to regulate a great deal of speech; judicial interpretation, especially in the late twentieth century, has lead to a robust free speech principle, far beyond anything envisaged by the First Amendment's authors and ratifiers. I have mentioned that the Fourteenth Amendment, when originally ratified, did not prohibit sex discrimination at all. But the American Constitution is now understood to ban most forms of sex discrimination, and indeed to contain a far more robust ban than can be found under most of the world's constitutions that contain *explicit* bans on sex discrimination.[61]

If the American Constitution meant what it originally meant, the nation would have a lot of explaining to do—and the absence of social and economic rights would be one of the least conspicuous forms of American exceptionalism at the constitutional level. Here is a hypothesis: an interpretation of the Fourteenth Amendment that called for social and economic rights would not, in fact, be much more of a stretch of the document than many interpretations that are now taken for granted in American constitutional law. I cannot defend the hypothesis here; to do so, it would be necessary to say a great deal about what constitutional interpretation entails. But I believe that I am building on conventional understandings.

All of this is relatively abstract. Let us identify a more concrete explanation for American practice, one that stresses the contingency of the Constitution's meaning. I shall call this the *realist explanation* because of

60. *See, e.g.*, Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995).

61. *See, e.g.*, Pers. Adm'r of Massachusetts v. Feeney, 442 U.S. 256, 274 (1979); *see also, e.g.*, INDIA CONST. pt. III (Fundamental Rights), art. 15.

its connection with the legal realist movement of the 1930s, which emphasized that judicial interpretation of the law, including the Constitution, has a great deal to do with the political commitments of the judges. The realist explanation stresses that American constitutional law is, to a considerable degree, a form of common law, based on analogical reasoning. It suggests that American constitutional law could easily have come to recognize social and economic rights. It urges that the crucial development was the election of President Nixon in 1968, which produced four Supreme Court appointments. This, in turn, lead to a critical mass of justices willing to reject the claim that social and economic rights were part of the Constitution. So described, the realist explanation seems to me entirely correct.

To understand the point, it is necessary to see that there was a serious and partially successful effort, in the 1960s and 1970s, to understand the existing Constitution as creating social and economic guarantees. In several of the cases, the Court went so far as to hold that the government must subsidize poor people in certain domains. For example, in *Griffin v. Illinois*, the Court held that the Equal Protection Clause requires states to provide trial transcripts or their equivalent to poor people appealing their criminal convictions.[62] In *Douglas v. California*, the Court extended this ruling, concluding that poor people must be provided with counsel on their first appeal of a criminal conviction.[63] In *Harper v. Virginia Board of Elections,* where the Court struck down the poll tax, it effectively ruled that states must provide the vote free of charge—even though it is expensive to run an election.[64]

These decisions emphatically recognize social and economic rights; they say that the government must provide financial assistance to poor people in certain domains. For this reason, it is too simple to say that the American Constitution is not understood to create social and economic rights. But the reach of these decisions is limited to contexts in which poverty interacts with interests that seem part and parcel of citizenship (e.g., the rights to vote and to contest a criminal conviction). In other cases, however, the Court went further. In *Shapiro v. Thompson*, the Court held that Connecticut, the District of Columbia, and Pennsylvania could not, consistently with the Constitution, impose a one-year waiting period before new arrivals to the state could receive welfare benefits.[65] The Court relied on the constitutional right to travel, but it also spoke of the special

62. Griffin v. Illinois, 351 U.S. 12, 19-20 (1956).
63. Douglas v. California, 372 U.S. 353, 357 (1963).
64. Harper v. Virginia Bd. Of Elections, 383 U.S. 663, 672 (1966).
65. 394 U.S. 618, 642 (1969).

needs of people, contending that the laws deny "welfare aid upon which may depend the ability of the families to obtain the very means to subsist—food, shelter, and other necessities of life."[66] If the right to travel was all that was involved, this suggestion would seem purposeless.

Indeed, the Court came to give procedural protection to welfare benefits in the important sense that, under the Due Process Clause, the government is not permitted to remove those benefits without giving people a hearing.[67] Hence, welfare benefits can count as "property" within the meaning of the Due Process Clause.[68] In its initial decision, the Court emphasized the particular nature of welfare benefits:

> Welfare, by meeting the basic demands of subsistence, can help bring within the reach of the poor the same opportunities that are available to others to participate meaningfully in the life of the community. . . . Public assistance, then, is not mere charity, but a means to "promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity."[69]

With its striking reference to the Constitution itself, the Court seemed to signal its willingness to consider the possibility that some constitutional provision would grant a right to subsistence for those in need. In fact, prominent academic writing suggested that the Court was moving in that direction.[70]

By 1970, it was not at all clear that the Court would not eventually recognize a set of social and economic rights. In retrospect, the crucial event was the election of President Nixon in 1968, and his four appointments to the Court: Warren Burger in 1969, Harry Blackmun in 1970, and Lewis Powell and William Rehnquist in 1972. These appointees proved decisive to a series of extraordinary decisions, issued in rapid succession, limiting the reach of Warren Court decisions, and eventually making clear that social and economic rights do not have constitutional status outside of certain restricted domains. During the period from 1970 to 1973, the Court cut off the emerging development. Here is a brief outline.

In *Dandridge v. Williams*, the Court rejected a constitutional challenge to a state law that imposed an upper limit on the size of grants

66. *Id.* at 627, 638.
67. Goldberg v. Kelly, 397 U.S. 254, 261 (1970).
68. *Id.* at 263 n.8.
69. *Id.* at 265.
70. *See* Frank I. Michelman, *Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7, 9 (1969).

under its welfare program, regardless of the size of the family.[71] The Court recognized that pressing necessities were involved, but found that fact constitutionally irrelevant, and said so explicitly.[72] In *Lindsey v. Normet*, the Court upheld a state's summary eviction procedure.[73] The appellants contended that the "need for decent shelter" and the "right to retain peaceful possession of one's home" were fundamental interests under the Constitution, subject to intrusion only after a powerful showing of countervailing government justification.[74] The Court rejected the argument, saying, "The Constitution does not provide judicial remedies for every social and economic ill. We are unable to perceive in that document any constitutional guarantee of access to dwellings of a particular quality . . . ."[75] Justice Powell wrote the key decision for a five-to-four majority in *San Antonio Independent School District v. Rodriguez*, which upheld a constitutional challenge to the local financing of public schools—even though local financing produces large intrastate disparities in per-pupil expenditures.[76] Justice Powell's lengthy opinion understood the Court's previous cases in an exceedingly narrow way, as involving absolute deprivations of constitutionally protected interests.[77] *Rodriguez* was effectively the death knell for social and economic rights in the United States.[78]

This overview should be sufficient to show that the brief period from 1970 through 1973 played a crucial and underappreciated role in American jurisprudence. The Nixon nominees rejected what appeared to be an emerging trend in the direction of recognizing a robust set of social and economic rights. There can be no serious doubt that Humphrey nominees would have seen things very differently. Of course, we cannot know what the Court would ultimately have said, nor can we know if a Humphrey Court would have improved the lives of poor people. But it does not seem to me too speculative to suggest that if Humphrey had been elected, social and economic rights, American-style, would have become a part of American constitutional understandings. The Court was rapidly heading in this direction. The election of Richard M. Nixon stemmed the tide.

Now it would be possible to respond that that very election attests to

71. 397 U.S. 471, 486 (1970).
72. *Id.* at 485.
73. 405 U.S. 56, 63-64 (1972).
74. *Id.* at 73.
75. *Id.* at 74.
76. 411 U.S. 1, 54-55 (1973).
77. *Id.* at 37-38.
78. For more detail about the period, *see* SUNSTEIN, *supra* note 22.

the strength of the cultural explanation—that Nixon's election was a product of America's distinctive culture, one that is hostile to social and economic rights. And to be sure, Nixon won partly because of cultural forces; his victory had everything to do with the events of the time. I cannot explore those events in detail here. But the Civil Rights Act of 1964 helped to persuade Southern voters to support Republican candidates; and the social unrest of the period, including riots in the cities, protests over the Vietnam War, and the assassinations of the Kennedys and of Martin Luther King, Jr., led numerous citizens to vote for Nixon, with his strong "law and order" platform. In fact, Nixon's election might well be seen as signaling the end of a period of liberal ascendancy in American politics, reaching its peak in the domestic policies of President Lyndon Baines Johnson. Nixon's victory was contingent, but it was hardly an accident; it reflected large-scale social forces. Perhaps those forces included antipathy to social and economic guarantees; perhaps Nixon won precisely because he could be expected to support an understanding of rights that did not include them. Perhaps Nixon was the anti-Roosevelt, and elected partly for that reason.

On the other hand, the 1968 election was exceptionally close, one of the closest in the nation's history, and it would be fantastic to suggest that the outcome was foreordained by a kind of national antipathy to social and economic rights. It is far more plausible to think that such rights were a casualty of an election that was fought out on other grounds. But what of the period since Nixon's election? In the last decades, the Court has shown little interest in reviving the trends that preceded that election. A central reason, of course, is that American presidents have not sought to appoint justices who want to move the Constitution in that direction. Even President Clinton chose two distinguished moderates, Ruth Bader Ginsburg and Stephen Breyer, who seem uninterested in aggressive judicial protection of social and economic guarantees.[79]

It is undoubtedly true that America's political culture has helped to produce a federal judiciary that no longer focuses on social and economic guarantees. Of course, America's constitutional understandings have a great deal to do with its cultural understandings. What I am emphasizing here is that if not for a close and contingent electoral outcome, one that was far from inevitable, the American Constitution would almost certainly recognize some kinds of social and economic rights.

79. I am not saying that they are wrong; in my view, Roosevelt was right to say that decent opportunity and minimal security should be provided politically rather than judicially, but my focus here is on the reasons for American exceptionalism, not on constitutional design.

CONCLUSION

Why does the American Constitution lack social and economic rights? The chronological explanation contains some truth; in the late eighteenth century, such rights simply were not on the viewscreen for constitution makers. But the chronological explanation fails for the simple reason that constitutional meaning changes over time, and chronology alone does not explain the fact that the countless changes in modern constitutional understandings do not include recognition of social and economic rights.

The institutional explanation properly draws attention to the fact that many authors of international documents and constitutions do not think much about the question of enforcement, and instead attempt to set out goals or aspirations. American constitutionalism has generally avoided this strategy. Constitutional design, emphatically including constitutional interpretation, has been undertaken with close reference to the possibility of judicial enforcement. The problem with the institutional explanation is that social and economic rights can, in fact, coexist with judicial enforcement. There are difficulties here, but they are not insuperable.

It is tempting to think that the constitutional status of social and economic rights will be very much a function of the power, in the relevant nation, of movements for socialism or for social democracy. To some extent this is certainly true, almost a truism. But it is far from impossible to believe, enthusiastically, in a market economy, and to believe at the same time in the obligation to ensure decent conditions for everyone. The framers of the American Constitution were hardly socialists, but Madison, the most important framer of all, emphasized the need for laws that would "raise extreme indigence toward a state of comfort."[80] The New Dealers were hardly socialists, but Franklin Delano Roosevelt supported a Second Bill of Rights, one that amounts to a match for the most expansive of social and economic rights in international documents and the modern constitutions. Many American conservatives, enthusiastic about free markets, have endorsed the idea of a social safety net for all. For these reasons, it is too crude to invoke American exceptionalism as the explanation of the absence of social and economic rights in the American Constitution.

The realist explanation places a spotlight on the underappreciated fact that the United States Supreme Court came very close, in the 1960s and 1970s, to recognizing social and economic rights under the Constitution. A step of this kind would not have been fundamentally different from much

80. *See* Madison, *supra* note 33, at 197.

of what the Court actually did in the twentieth century. Why did the Court refuse to recognize the relevant rights? A large part of the answer lies in the presidential election of 1968 and in particular in President Nixon's four critical appointments: Chief Justice Warren Burger and Justices Blackmun, Powell, and Rehnquist. In a very brief period in the early 1970s, the Court, led by these nominees, cut the ground out from an emerging movement. This, I suggest, is a real source of "American exceptionalism" in the domain of social and economic rights.

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